

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

MISC. APPLICATION NO. 0775 OF 2017
(ARISING FROM CIVIL 0433 OF 2014)

KAMADA BUKENYA:..... APPLICANT

V E R S U S

1. EDITH NAKANDI
2. UMAR KATONGOLE:..... RESPONDENTS

AND

MISC. APPLICATION NO. 1075/2017

EDITH NAKANDI:..... APPLICANT

VERSUS

AG. & OTHERS:..... RESPONDENTS

BEFORE HON. MR. JUSTICE HENRY I. KAWESA

CONSOLIDATED RULING

Misc. Application No. 0775/2017 is an application by Notice of Motion under Sec. 82 of the Civil Procedure Act and O.46 R1(1) of the Civil Procedure Rules for orders that;

- i) *The consent order made by the Registrar be reviewed and set aside*
- ii) *The Applicant be added as a co- Plaintiff in the head suit*
- iii) *Costs of the application be provided for.*

The Notice of Motion is supported by the affidavit of Kamada Bukenya the Applicant. The application is opposed by the 2nd Respondent Umar Katongole who deponed an affidavit in rebuttal of the application.

The 1st Respondent swore an affidavit in which she supports the application.

The brief facts giving rise to this application are that the Registrar of the High Court Land Division entered a consent judgment under HCSS No. 433/2015 between the 1st Respondent and 2nd Respondent (4th Defendant).

The Applicant avers that the said orders affect his interests in the land and hence he prays they be reviewed and set aside and he be allowed to be added to the suit as a co-plaintiff.

From the pleading and submissions, it was contended for the Applicant that the Applicant can be heard as per section 82 of the Civil Procedure Act and O.46 r1 the Civil Procedure Rules which authorizes any person who considers himself or herself aggrieved by the decree or order of the Court, to apply for review of a judgment to the Court which passed the decree or made the order.

It was argued that the consent judgment was entered by the Registrar in error, as there was a Judge's order of injunction restraining the Defendants from acting with the suit land in any way till the disposal of the suit. They argued that the Registrar had no jurisdiction to enter a consent judgment in a partly heard suit before a Judge. They referred to **AG. & ULC versus James Mark Kamoga & James Kamada, SCCA No. 8 of 2004**, for authority to bring this application before the Judge, so as to have the Registrar's orders vacated.

They further argued that the Applicant is an '*aggrieved person*' in his capacity as a tenant by occupancy on the land.

They further argued that the Applicant ought to have been given first priority to buy the reversionary interest in the suit land before transfer to the Defendants which was not done. This was an illegality and violated Sec. 35(2) of the Land Act.

Counsel for the Applicants argued that Court is bound not to sanction the said illegality as per **Makula International versus His Eminence Cardinal Nsubuga (1982) HCB 11**.

Counsel further argued that the Respondent acted in bad faith and in fraud. They argued that for the aforesaid reasons, this application should be allowed with costs.

In reply, Counsel for the 2nd Respondent argued by way of a Preliminary Objection that the application is an abuse of Court process since the Applicant already filed HCCS NO. 193 of

2016 against the 2nd Respondent, seeking for orders that he is a bonafide occupant of the land in issue.

Secondly Counsel argued that the Applicant was not a party to HCC NO. 433 OF 2015 and can therefore not be an aggrieved party. They further argued that the Applicant was a witness in Court for 1st and 2nd Respondent and hence had no locus to sue as a beneficiary.

It was submitted further that this application is an abuse of Court process and is bad in law and should be dismissed with costs.

The 1st Respondent only filed an affidavit in reply in which she basically states that the consent judgment was entered in error since there were other orders of an injunction from the Presiding Trial Judge. Given the pleadings and submissions summarized above, I now make the following findings arising from this application.

1. JURISDICTION OF THE REGISTRAR TO REVIEW THE CONSENT JUDGMENT

This position has been settled by the **Supreme Court Case of Degeya Trading Store (U) Ltd. Versus URA CACA NO. 44/1996** where **Hon. J. Mulenga** (as he then was) held *inter alia* that;

‘the powers of the Registrar to handle matters governed by specified rules and orders of the Civil Procedure Rules, do not include any rule under order 46. Clearly the power to review Judgments or Orders of the High Court, (including those entered by the Registrar) is not among the powers delegated to the Registrar’.

It is therefore my finding that the Applicant was right to file this application before the Judge, though it was entered by the Registrar, because the Registrar has no power to review her own orders in this matter.

2. WHETEHR THE REGISTRAR HAD POWER TO ENTER CONSENT JUDGMENT

From the case of **Degeya Trading Store (U) Ltd. Versus URA CACA NO. 44/1996** (*supra*) – Court guided that the Registrars are guided by the provisions of the Civil Procedure Rules and the Practice Direction No.1 of 2002. Registrars or their Deputies are charged with the duty of entertaining all formal steps preliminary to the trial and all interlocutory applications. (*See O.50 r3 of the Civil Procedure Rules*).

While exercising their jurisdiction under O.50 of the Civil Procedure Rules, the Registrars are deemed to be a Civil Court.

Where in their opinion they deem the matter to be proper for the decision of the High Court, they have the mandate to refer it to the Judge of the High Court who in turn has the mandate to either dispose it of or refer it back to the Registrar with the necessary directions. A registrar can therefore enter a consent judgment; if it arises as preliminary to the trial or if the same specifically arises from the directions issued to him/her for the purpose by the trial Judge. *See O.50 r6 & 7 of the Civil Procedure Rules*).

3. WHETHER THE APPLICANT HAS LOCUS TO BRING THIS APPLICATION

It was argued that the Applicant has no *locus* since he was a stranger to the consent judgment. He was a witness in Civil Suit No. 433 of 2015 for the 1st Respondent, yet he also later filed Civil Suit No. 193 of 2016 (as he conceded in paragraph 1(i)) in Kamada Bukenya's affidavit in rejoinder.

I have considered the Preliminary Objection raised by the Applicant and I have also examined the affidavits by Kamada Bukenya in support and rejoinder and affidavits of Edith Nakandi (1st Respondent) and Umar Katongole (2nd Respondent) and I do find as follows:

The Applicant herein was at all material times a participant in HCCS NO. 433 of 2015, where he participated as a witness. (*See paragraphs 5,6 and 7 of Umar Katongole's affidavit*). He however did not apply at the time to be joined as a party, but instead filed HCCS NO. 193 of 2016. (*See par 17 of Umar Katongole's affidavit*). The affidavit in rejoinder by Kamada (Applicant) in paragraph 1(i) and 1(v), confirm that the causes of action in Civil Suit No.193/2016 and Civil Suit No.443/2015 are the same. I have found further that the affidavit of Edith Nakandi in paragraphs 3 and 10, shows that the Applicant was all along aware of the Respondents Civil Suit No. 433/2015 and the entire cause of dispute before the said consent judgment was entered.

The facts above are very important in determining the application for review/setting aside of the said order. The main consideration for review of a consent judgment was considered in **Mohamed Allibai versus W E Bukenya Mukasa and Departed Asians Property Custodian Board**, where it was held that:

‘consent judgments can be set aside for fraud, collusion or for any other reason which would enable Court to set aside an agreement’.

In **Brooke Bond and Hebig T Ltd versus Malya (1975) EA 265**; it was stated that;

‘prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion by an agreement contrary to the policy of the Court or if consent was given without sufficient material facts or in the misapprehension or ignorance of material facts or in general for a reason which would enable the Court to set aside an agreement.....’.

In this application the Applicant ought to show that the above facts were paramount. In all review cases, the Applicant should prove discovery of new matters or evidence which the Applicant alleges was not within his or her knowledge or could not be adduced by him or her when the decree or order was passed or made.

I note from this case that the Applicant already knew the facts whereupon he was called on as a witness. Evidence shows that he even waited until the 1st Respondent and 2nd Respondent entered a consent, then he also filed his application, which is hinged on reliefs that are still pending under Civil Suit No. 193/2016. The Applicant sues as ‘*a beneficial occupant*’ yet in *HCT CS NO. 193/2016*, he seeks Court to pronounce him ‘*a bonafide occupant*’. Technically the applicant’s position is not clear. He was a witness in HCCS NO. 433/2015. He has a pending claim against the 2nd Respondent in Civil Suit No. 193/2016. He was not a party in HCCS NO. 433 of 2015. He is therefore not in the strict sense of the word ‘*an aggrieved party*’ for purposes of this application. I do not find any new evidence which warrants a review.

I am therefore unable to grant the Applicant the remedy for review as prayed.

4. WHETEHR THE CONSENT WAS VALID; APPLICANTS RIGHTS VERSUS THE OTHERS AS IN EDITH NAKANDI VERSU AG & ORS (MISC. APPLICATION NO.1075/2017 & 0775/2017)

In Misc. Application No. 1075/2017, the Applicant; Edith Nakandi prayed for setting aside of the consent judgment entered by the Registrar on 12th May 2017. The Applicant however in the application has shown by the affidavit of the 1st Respondent Edith Nakandi under, paragraphs 1,2,3,4,5,6,7,8,9,10 that there are serious issues surrounding the way the consent order was obtained. In paragraph 6, she alleged that she was misled by the 2nd Respondent; (Umar Katongole) (the 4th in this application) and his lawyer to sign the consent in absence of her Advocate and that she did not understand what the contents of the said consent judgment and she had filed an application to set the same aside vide, (Misc. Application No. 1075 of 2017; Kamada, Edith Nakandi verses Administrator General and others. (see the affidavit of Edith Nakandi; paragraphs 6,7,8,9,10,11 – 23) in support of the application.

I have perused that application and as per paragraphs 6 - 23 of her affidavit, she indeed covers the above averments. The law that governs consent judgments is that they can be set aside for fraud, collusion or any other reason which would enable Court to set aside an agreement.

In this case, I do take note of the fact that Edith Nakandi who signed the consent is giving evidence to show that she entered the same by fraud, and collusion. She claims that she did not even understand the terms of the consent (par 6). Though represented by Counsel as per paragraphs 6 – 16 of the affidavit in support, it is shown that her Lawyers were not present at the time she signed the same. That omission was grave and the explanation in the affidavit in rebuttal is not satisfactory.

It is further deponed that the matter was undergoing hearing before a judge who had even issued an interim order of injunction (*see par 9 of Edith Nakandi*) and (*paragraphs 7,8,9,10 and 11 of Umar Katongole in Misc. Application No. 0775/2017*), which shows that injunctive relief had been ordered by the Judge.

In this matter therefore, there were errors done by the Registrar to allow the 2nd/4th Respondent and his lawyer to purportedly enter consent in a matter which was pending and on hearing before the Judge, without such directions coming from the Trial Judge. The scenario was made worse

by the fact that the 1st Respondent/Applicant who had services of Counsel was on that day not represented. The facts as presented by the pleadings therefore amount to a revelation that an illegality did happen. The process of entering this consent was irregular. As it has been shown, this consent Judgment was not made in the presence of Counsel, parties and the trial Judge. There is evidence of collusion and acting contrary to the policy of the Court. The 1st Applicant has deponed that she signed in ignorance without knowing all the implications and hence there was misapprehension of what was entailed in the said consent.

In view of the findings above, this Court now rules as herebelow, regarding both applications:

1. *The consent judgment was entered in error.*
2. *The Applicant; Kamada Bukenya, is not entitled to an order for review of the order to allow him to join the pleadings as a co-Plaintiff.*
3. *The consent order will be and is hereby set aside.*
4. *The findings herein affect the final outcome of Misc. application No. 1075/2017; Edith Nakandi versus Administrator General & Others in that the said application is granted; to the extent that it is ordered that the consent judgment be set aside.*
5. *All parties should revert to the position as ordered by the last trial Judge in HCCS No. 433 of 2015, granting the injunction till the final disposal of HCCS No. 433/2015 which should be immediately fixed for further hearing.*
6. *The 2nd Respondent in Misc Application No. 775/2017 UMAR KATONGOLE, i.e. is entitled to a refund of all the money paid to the 1st Respondent; Edith Nakandi at the signing of the impugned consent judgment.*
7. *Kamada Bukenya is not granted leave to join as a co- Plaintiff.*
8. *Costs in all the applications will abide in the main cause.*

I so order.

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Henry I. Kawesa

JUDGE

9/11/2017

9/11/2017:

Eric Muhwezi for the Applicant

Kawesi Kakooza for Mugisha Ronnie for 1st Respondent.

Nasser Kigozi for 2nd Respondent.

Applicant present

Court: Ruling delivered in the presence of the parties.

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Henry I. Kawesa

JUDGE

9/11/2017